Transfield Projects (M) Sdn Bhd & Anor v Malaysian Airlines Systems Bhd

HIGH COURT (KUALA LUMPUR) — SAMAN PEMULA NO DI–24–75 TAHUN 1998
MOHD GHAZALI J
17 MAY 1999

Contract *— Performance bond — 'On demand' bond — Application for injunction to restrain defendant from calling on performance bond — Damage to reputation — Whether defendant could be restrained from calling upon bond — Balance of convenience*

The plaintiffs had been awarded a contract for works conditional upon the plaintiffs submitting a performance bond for 10% of the contract sum. Disputes arose between the parties and the plaintiffs gave notice of arbitration and accepted repudiation of the contract by the defendant. The plaintiffs abandoned all works on the site. The plaintiffs alleged that a compromise was reached and/or that the parties were still in negotiations when the plaintiffs were remobilized and accepted on the site. The draft supplementary agreement was never formalized and signed. The plaintiffs then received notice that the defendant had made a call on the performance bond. The plaintiffs sought to restrain the defendant from making a call upon or from utilising the proceeds of the performance bond.

Held, dismissing the application:

(1) It was conceded by the plaintiff that the bond was an unconditional bond and the draft supplemental agreement was never formalized (see pp 590A, 589A);

(2) The bond was an 'on demand' bond and the defendant had made a demand for the same (see p 596C–D);

(3) The court do not think an injunction should be granted to restrain the defendant, who now has the proceeds of the performance bond, to set it aside in an account on trust pending arbitration. There is no existence of any obligation on the part of the defendant to do so. To grant such an injunction as prayed for would allow a departure from the contract to which the parties have committed themselves. There is clearly no subsisting obligation on the defendant who has already received the monies as the result of the call made on the performance bond to set it aside and not to appropriate it. Clause 37(c) provides the defendant or the uperintending officer on its behalf may utilize and make payments out of or deductions from the said performance bond, ie they may have recourse thereto for payments. The court is now asked to grant an injunction when there is clearly no obligation imposed on the defendant anywhere in the contract to set the proceeds as a separate trust fund to be kept until the outcome of the arbitration (see pp 596H–I, 597A–B);

(4) Although the plaintiffs alleged that they would suffer damage to their reputation, there was no evidence of such before the court. To uphold a contention of 'damage to reputation' would open the floodgates for parties who have submitted performance bonds under building contracts to invoke the same in every instance; *Bocotra Construction Pte Ltd & Ors v Attorney General (No 2)* [1995] 2 SLR 733 followed. The plaintiffs in the instant case have failed to show that if the defendant is not so injuncted, irreparable harm or damage would be caused to them and such harm or damage would place them in an irretrievable position incapable of remedy by way of damages (see pp 597D–I, 598A).

[Bahasa Malaysia summary

Plaintif-plaintif telah diawardkan satu kontrak untuk kerja-kerja yang bersyarat ke atas plaintif-plaintif mengemukakan satu bon perlaksanakan bagi nilai 10% daripada jumlah kontrak. Pertikaian berbangkit antara pihak-pihak tersebut dan plaintif-plaintif memberikan notis timbangtara dan menerima penolakan akan kontrak tersebut oleh defendan. Plaintif-plaintif telah meninggalkan kesemua kerja-kerja di tapak. Plaintif-plaintif mendakwa bahawa satu kompromi telah dicapai dan/atau bahawa pihak-pihak tersebut masih dalam perundingan apabila plaintif-plaintif telah ditempatkan semula dan diterima ditapak tersebut. Draf perjanjian tambahan tidak pernah dirasmikan dan ditandatangani. Plaintif-plaintif mendapat notis bahawa defendan telah membuat tuntutan ke atas bon perlaksanaan tersebut. Plaintif-plaintif cuba untuk menghalang defendan daripada membuat panggilan atau daripada menggunakan hasil dari bon perlaksanaan tersebut.

Diputuskan, menolak permohonan tersebut:

(1) Ianya telah dipersetujui oleh plaintif bahawa bon tersebut adalah satu bon tidak bersyarat dan deraf perjanjian tambahan tidak pernah dirasmikan (lihat ms 590A, 589A).

(2) Bon tersebut adalah bon 'on demand' dan defendan telah membuat tuntutan baginya (lihat ms 596C–D).

(3) Mahkamah tidak fikir satu injunksi patut diberikan untuk menghalang defendan, yang sekarang memperolhi hasil daripada bon pelaksanaan, untuk mengenepikannya dalam satu akaun amanah semantara menunggu penimbangtaraan. Tiada apa-apa tanggungjawab yang wujud di pihak defendan untuk berbuat demikian. Untuk memberikan injunksi sedemikian sebagaimana yang dipohon akan membenarkan satu penyimpangan daripada kontrak yang mana pihak-pihak tersebut telah terikat. Adalah jelas tiada tanggungjawab yang wujud pada defendan yang telahpun menerima wang tersebut hasil daripada tuntutan yang dibuat atas bon pelaksanaan untuk mengenepikannya dan untuk tidak

memperuntukkannya. Klausa 37(c) memperuntukkan defendan atau pegawai penguasa bagi pihakny boleh menggunakan dan membuat bayaran daripada atau menolak daripada bon pelaksanaan tersebut, iaitu ia boleh meminta bantuan daripadanya untuk bayaran-bayaran tersebut. Mahkamah sekarang dipohon untuk memberikan satu injunksi apabila adalah jelas tiada tanggungjawab ke atas defendan mana-mana dalam kontrak untuk menetapkan hasil tersebut sebagai satu tabung dana yang disimpan sehingga keputusan penimbangtaraan (lihat ms 596H–I, 597A–B).

(4) Walaupun plaintif-plaintif mendakwa bahawa mereka telah mengalami kemudaratan terhadap reputasi mereka, tiada keternagn sedemikian yang dihadapkan ke mahkamah. Untuk mengekalkan satu penegasan 'kemudaratan reputasi' akan membuka jalan kepada pihak-pihak yang telah mengemukakan bon-bon pelaksanaan di bawah kontrak-kontrak pembinaan untuk menggunakan yang sama setiap kali ; *Bocotra Construction Pte Ltd & Ors v Attorney General (No 2)* [1995] 2 SLR 733 diikut. Plaintif-plaintif dalam kes sekarang ini telah gagal untuk menunjukkan bahawa jika defendan tidak begitu beringat, kemudaratan dan kerugian yang tidak boleh diperbaiki akan berlaku ke atas mereka dan kemudaratan dan kerugian sedemikian akan meletakkan mereka dalam keadaan yang tidak boleh dipulihkan dengan remedi melalui ganti rugi (lihat ms 597D–I, 598A).]

Notes

For cases on performance bond generally, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 3425–3441.

Cases referred to

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241 (refd)

Bocotra Construction Pte Ltd & Ors v Attorney General (No 2) [1995] 2 SLR 733 (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517 (refd)

Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd [1995] 1 MLJ 149 (refd)

Keet Gerald Francis Noel John v Mohd Noor @ Harun bin Abdullah & Ors [1995] 1 MLJ 193 (refd)

Sri Palmar Development & Construction Sdn Bhd v Transmetric Sdn Bhd [1994] 1 CLJ 224 (refd)

Teknik Cekap Sdn Bhd v Public Bank Bhd [1995] 3 MLJ 449 (refd)

Raja Aziz Addruse, P Gananathan & Robin Choi (*Logan Sabapathy & Co*) for the plaintiffs. A

Wilfred Abraham, Rodney Gomex dan Muralee Nair (*Shearn Delamore & Co*) for the defendant.

Mohd Ghazali J: By an originating summons filed on 4 March 1998 the plaintiffs claim the following relief and/or orders: B

(1) a declaration that on the true construction of the bank guarantee form for performance bond dated 3 June 1996 issued by Citibank Bhd read together with the contract documents for the execution, completion, testing, commissioning and maintenance of the MAS Catering Building at the new Kuala Lumpur International Airport, Sepang C dated 27 May 1996 as supplemented by the compromise breach between the plaintiffs and the defendant on 26 February 1998, the defendant is not entitled to call upon, demand, rely on, receive payments or utilize proceeds of such payment under the said Performance Bond until full determination of the contractual disputes referred to arbitration by the plaintiff vide notice of arbitration dated D 28 January 1998;

(2) a declaration that on the true construction of the bank guarantee form for performance bond dated 3 June 1996 issued by Citibank Bhd read together with the contract documents for the execution, completion, testing, commissioning and maintenance of the MAS Catering E Building at the new Kuala Lumpur International Airport, Sepang dated 27 May 1996 as supplemented by the compromise breach between the plaintiffs and the defendant on 26 February 1998, the demand made as at 3 March 1998 on the said Performance Bond dated 3 June 1996 issued by Citibank Berhad is unconscionable, lacking in bona fides and unenforceable as against the plaintiffs and is F subject to restitution;

(3) consequent to an order being granted under paras (1) or (2) above, that the defendant, its servants or agents or howsoever otherwise be restrained and an injunction be granted restraining them from relying, acting, receiving payments or utilising proceeds of such payment G under the bank guarantee form for performance bond dated 3 June 1996 issued by Citibank until full determination of the contractual disputes referred to arbitration by the plaintiffs vide notice of arbitration dated 28 January 1998 other than restoring such proceeds in a fixed deposit interest bearing account with Citibank Bhd;

(4) an order directing the defendant to place all such proceeds received H under the bank guarantee form for performance bond dated 3 June 1996 issued by Citibank Bhd in a fixed deposit interest bearing account in Citibank Bhd to abide by an award by way of arbitration of the disputes referred by the plaintiffs vide notice of arbitration dated 28 January 1998.

I

On the same day, the plaintiffs filed an ex parte summons in chambers (encl 3) praying for the following orders:

(1) that the defendant, its servants or agents howsoever otherwise be restrained and an injunction be granted restraining them from relying, acting receiving or utilising proceeds of such payment under the bank guarantee form for performance bond dated 3 June 1996 issued by Citibank Bhd other than restoring such proceeds in a fixed deposit interest bearing account with Citibank Bhd or any other bank to be held on trust pending determination of the contractual disputes referred to arbitration by the plaintiffs vide notice of arbitration dated 28 January 1998;

(2) consequent to an order under (1) above, the defendant be ordered and directed to remit all such sums received under the bank guarantee form for performance bond dated 3 June 1996 to Citibank Bhd forthwith to be segregated and kept in a separate account.

Enclosure 3 was subsequently ordered by the court to be heard inter-partes. At the hearing of encl 3, leading counsel for the plaintiffs informed the court that as far as prayer (1) is concerned, he is only going on the word 'utilising' and that he is not pursuing prayer (2).

On 17 May 1999, I dismissed the application with costs and I now give my reasons.

The facts show that on 27 May 1996 the defendant awarded a contract for the execution, completion, testing, commissioning and maintenance of the MAS Catering Building at the new Kuala Lumpur International Airport, Sepang to the plaintiffs as main contractor for a contract lump sum of RM236,800,000 ('the project'). As a condition precedent to the commencement of works under the said project, the plaintiffs are required to submit a performance bond of RM23,680,000 being 10% of the tender sum, such bond to be valid, inter alia, up to the issue of the certificate of completion of making good defects or the expiration of the defects liability period for works carried out by the plaintiffs whichever is the later. The conditions of contract provide for the appointment of a superintending officer ('SO'), who was duly appointed, and at all material times the SO acted for and on behalf of the defendant wherein the plaintiffs' lines of communication was carried out through the SO. It was also agreed therein that the date of possession of site shall be 3 June 1996 and the contract completion date shall be 30 November 1997.

Subsequenty disputes arose in relation to the contract and both the plaintiffs and the defendant allege breach of obligations under the contract of the other under the project. Consequently by way of letter dated 28 January 1998 addressed to the SO and copied to the defendant, the plaintiffs gave notice of arbitration under the arbitration clause of the conditions of contract requiring specific disputes to be referred to arbitration. The plaintiffs in the said letter also gave notice advising of their intention to accept the repudiation of the contract by the defendant. On 21 February 1998 the plaintiffs once again wrote the SO copied to the defendant accepting the repudiation of the contract by the defendant thereby terminating the contract. Shortly thereafter, the plaintiffs abandoned all works under the said project and vacated the construction site.

On 24 February 1998, representatives of the plaintiffs and the defendant met at the defendant's offices to try and resolve the outstanding disputes and the issue of termination. The plaintiffs insisted that a compromise was reached as concluded by the parties in an addendum to the contract No 1/98 dated 26 February 1998 ('the addendum') which provided, inter alia, as follows:

(a) that the defendant would pay RM10m to the plaintiffs within two days of the agreement to cover part of the works done for variations not certified;

(b) that the plaintiffs undertake to complete all works with certain defined exceptions as required under the contract by 31 March 1998 and the defendant pursuant to this grant the plaintiffs an extension of time until the end of March 1998;

(c) that both the plaintiffs and the defendant would retract the termination of the contract;

(d) that the defendant will provide a draft amended contract to the plaintiffs reducing its scope of works.

It must be noted here that only the signature of a representative of the plaintiffs appears on the copy of the addendum which was marked as exhibit P6 in the plaintiffs' affidavit (encl 2).

Be that as it may, a further meeting was held on 26 February 1998 between the plaintiffs and the defendant at the defendant's offices wherein the parties, according to the plaintiffs, over and above the agreement reached in the addendum further agreed, inter alia, on the following:

(a) that a mediator will be appointed within two weeks of execution of the addendum to assess the plaintiff's claims targeted to be resolved by the end of March 1998;

(b) that a supplementary agreement to the contract be targeted for resolution within one week from execution of the addendum;

(c) that the plaintiffs acceptance of repudiation letter dated 21 February 1998 be held in escrow pending finalisation of the supplementary agreement.

A draft supplementary agreement was subsequently prepared by the defendant and handed to the plaintiffs. The supplementary agreement purports to record an agreement between the parties, amongst other things, on the reduction of the sums secured for the performance bond to RM15,130,000 being 10% of the revised lump sum. According to the plaintiffs, as at 2 March 1998, representatives of the plaintiffs and defendant were still discussing the finer points of the draft supplementary agreement. Meanwhile, on the basis of the compromise reached as evidenced in the addendum and good faith, the plaintiffs claimed they commenced remobilisation on the site on or about 27 February 1998. The plaintiffs claim the defendant through the SO accepted the plaintiffs back onto site wherein the plaintiffs with more than 500 staff at site had recommenced works in double shifts — they came back in reliance of the discussion. It is the plaintiffs' stand that the SO by its own conduct in issuing instructions on work related matters under the project, recognized the February variation cum compromise reached.

It is not disputed that the draft supplementary agreement was never formalized and executed.

The plaintiffs then claimed that at about 2.45 pm on 3 March 1998 they received notice from the bank informing them that the defendant had made a call on the performance bond. It is not disputed that the defendant made a call and demand on the performance bond on 3 March 1998 and thereafter received the proceeds. The plaintiffs claim that this call was made contrary to the understanding and compromise reached between the parties on 26 February 1998. The plaintiffs also claim that even after 3 March 1998 instructions were given by the SO.

On 4 March 1998 the plaintiffs filed this originating summons and the ex parte summons in chambers and on 5 March 1998 the court granted an interim order, namely, that the proceeds of the performance bond to be placed by the defendant into a segregated fixed deposit account with the defendant's own bankers with notice to be given to the plaintiffs until the disposal of this application.

The performance bond, inter alia, read:

> BANK GUARANTEE FORM FOR PERFORMANCE BOND
>
> THIS AGREEMENT is made the 3 June 1996 BETWEEN CITIBANK BERHAD of No 28, Medan Pasar, 50050 Kuala Lumpur (hereinafter called the 'Guarantor') of the one part and MALAYSIAN AIRLINE SYSTEM BERHAD (hereinafter called the 'Employer') of the other part.
> Whereas:
>
> 1 In consideration of the Employer allowing Transfield Projects (M) Sdn Bhd/Bina Logamaya Sdn Bhd (hereinafter referred to as 'the Contractor') to the 'Execution, Completion, Testing, Commissioning And Maintenance Of The Catering Building At The New Kuala Lumpur International Airport In Sepang, Malaysia' for a contract sum of Ringgit Malaysia: Twenty Three Million Six Hundred and Eighty Thousand (RM23,680,000-00). WE, the undersigned at the request of the Contractor irrevocably undertake a guarantee to the Employer that:
>
> 2 The Guarantor has agreed to guarantee the due performance of the Contract in the manner hereinafter appearing.
>
> Now the Guarantor hereby agrees with the Employer as follows:
>
> 1 On the Employer's first written demand, the Guarantor shall forthwith pay to the Employer the amount specified in such demand notwithstanding any contestation or protest by the Contractor or Guarantor or by any other third party and without proof or conditions. Provided always that the total of all demands so made shall not exceed the sum of RINGGIT MALAYSIA: TWENTY THREE MILLION SIX HUNDRED AND EIGHTY THOUSAND (RM23,680,000) only, and the total amount recoverable against the Guarantor under this Agreement shall not exceed the said sum.

In his submission, counsel for the plaintiffs conceded that this is an unconditional bond. He agreed that in so far as an unconditional bond is concerned the person at whose request the performance bond is to be paid out cannot stop the bank from doing so, ie the plaintiffs cannot stop the bank paying to the defendant regardless of any dispute unless they can show fraud which is not an issue in this case. He, however, argued that if the plaintiffs can show that the defendant is acting unconscionably in demanding that the bank pay them the proceeds, they can refrain the defendant. In support of his contention counsel referred to '*The Modern Contract of Guarantee*' by Dr John Phillips and Dr James O'Donovan (2nd Ed) at pp 671-672 of chapter 15 entitled 'Performance Bond' which read:

> (iv) Fraud or unconscionable conduct
>
> In *Hortico (Aust) Pty Ltd v Energy Equipment Co (Aust) Pty Ltd* Young J acknowledged the possibility that relief could be obtained if there existed actual fraud or, possibly, unconscionable conduct by the beneficiary:
>
>> 'As I have said, with commercial transactions such as the present, the courts have consistently taken a 'hands off' approach, and it does not seem to me that anything short of actual fraud would warrant this court in intervening, though it may be that in some cases (not this one), the unconscionable conduct may be so gross as to lead to exercise of the discretionary power.
>>
>> What then might amount to fraud or 'gross' unconscionable conduct? The answer to the question is likely to be increasingly important because it is probable that the proprietor will now ensure that the terms of the standard form construction contract are modified so as not to impose a pre-condition on the proprietor's right to call in the bond.
>>
>> It is not difficult to imagine situations in which it could be argued that there has been fraud or unconscionable conduct on the part of the proprietor. For example, the proprietor may call in the bond in circumstances in which there has clearly been no breach of the construction contract by the contractor who is entitled to lawfully terminate the contract because the proprietor has failed to make the relevant progress payments. This possibility was acknowledged by Eveleigh LJ in the English Court of Appeal in *Potton Homes Ltd v Coleman Contractors Ltd*, who indicated that the underlying contract could not be ignored when it was lawfully terminated or there was a total failure of consideration. Similarly, in *Hughes Bros Pty Ltd v Telede Pty Ltd*, Cole J, although coming to the conclusion that the underlying contract imposed no express pre-condition on the right to enforce the bond, thought that the proprietor could still not make a 'specious or fanciful claim'.
>>
>> If the contractor is to succeed in restraining the proprietor from making a demand pursuant to the bond, he would need to show more than that there was a 'real issue' regarding the parties' contractual rights. The contractor would need to prove that there was a good arguable case that the proprietor had acted improperly in the manner alleged.'

Counsel pointed out after the plaintiffs had given notice on 28 January 1998 of the arbitration and that they intended to accept the repudiation, there was a vague response from the defendant as a result of which the plaintiffs sent another notice to say that they were accepting the repudiation and that

A was on 21 February 1998. That was when they abandoned the works and left the site. The letter which was described as 'a vague response' and which was written by the SO and dated 6 February 1998 read:

> MAS CATERING BUILDING MAS KLIA GROUND SUPPORT FACILITIES, SEPANG NOTICE OF ARBITRATION
>
> B We refer to your letter of 28 January 1998 concerning the above which was received on 3 February 1998.
>
> In accordance with cl 54d of the Contract, we hereby inform you that your request to refer your alleged disputes and differences to Arbitration cannot be actioned at this time. Any request for Arbitration will only be considered when you have completed the Works.
>
> C However, we remain available, at your convenience, to meet with you to endeavour to resolve any issues that may be of concern to you.

The plaintiffs' reply dated 21 February 1998 read:

> We refer to our Notice of Arbitration and repudiation dated 28 February
> D 1998.
>
> This letter serves as a notice of Transfield/Bina Logamaya JV's acceptance of your repudiation of the Contract. Accordingly, the Contract is hereby terminated and the parties' future obligations are at an end.

Three days later there were negotiations. On 26 February 1998 the parties
E met again and that led to the draft supplemental agreement. After the draft supplemental agreement was drafted, the plaintiffs commenced remobilisation on the site as a result of the negotiations. The plaintiffs insist that the contract was revived pursuant to the negotiations and on that basis they continued with the works on 27 February 1998. Up to 10 March 1998 the SO issued instructions regarding work on the site. However, on 3 March
F 1998 the defendant suddenly made a call on the performance bond.

It is the plaintiffs' stand that whilst they had proceeded to fulfill their obligations under the contract as per the compromise reached, the defendant without any notice whatsoever made a call on the performance bond without justification. Counsel for the plaintiffs conceded there is no term in the contract that the defendant must give notice before calling on
G the performance bond but be that as it may, it is their stand that the call or demand made on the performance bond is unconscionable, lacking in bona fides and clearly unenforceable and furthermore, there is no justification for calling on the performance bond given the fact that the plaintiffs are currently performing under the contract. Since the call has been made and
H the monies have been paid, counsel for the plaintiffs urged the court to make an order that the monies be kept in trust so that the defendant cannot utilize the monies until the arbitration.

Counsel submitted that they based their application on two grounds, namely:

I (i) it was unconscionable for the defendant to call in the performance bond when they were still giving instructions on the site;

(ii) it would be unconscionable for them to utilize the monies.

Counsel argued there is a dispute between the parties now before the arbitrator and that is the serious question to be tried. On the issue of the unconscionable conduct, he contended that it is because of the negotiations and that itself is a serious question to be tried and is now before the arbitrator. He insisted that the defendant will not suffer if the monies are kept in a separate account and not utilized. The plaintiffs' stand is that those monies are not theirs to spend. Such an injunction would also not inconvenience any party and the monies will remain intact. The serious issue to be tried that requires full determination is the issue as to whether the defendant is entitled to make an immediate demand or call on the performance bond. That issue is to be determined under the originating summons and in the interim, the plaintiffs require the protection of an injunction to restrain utilisation of the proceeds of the performance bond and that if the defendant is not so injuncted, irreparable harm or damage would be caused to the plaintiffs and such harm or damage would place the plaintiffs in an irretrievable position incapable of remedy by way of damages. Counsel submitted in all the circumstances of the case, the balance of convenience would lie in favour of the plaintiffs and that the status quo should be preserved by virtue of the following facts and circumstances:

(a) the performance bond is merely a security for performance of the works under the contract — the plaintiffs have demonstrated their good faith in continuing under the contract and performing the works;

(b) the plaintiffs are in a financial position to fortify and settle any such sums as may be owing under the performance bond if they do not succeed in their application under the originating summons;

(c) the plaintiffs have never in the past faced a similar situation wherein a performance bond has been acted or called upon;

(d) if the defendant is not injuncted, the plaintiffs' business and reputation would suffer by reason of the call on the performance bond and such hardship will be far greater than any benefit that the defendant would obtain;

(e) the plaintiffs would face tremendous problems in obtaining references from banks for such performance bonds in the future;

(f) the injunctive relief sought by the plaintiffs is for a limited period only, pending determination of the originating summons which can be disposed off much quicker than a writ action.

The plaintiffs also claim that the first plaintiff belongs to a conglomerate of companies wherein the ultimate holding company is firmly established in Australia known as Transfield Holdings Pty Ltd and the Transfield group declared a turnover of AUD$1.1 billion with shareholders' funds of AUD$336.6 million. Transfield Holdings Pty Ltd provides financial and technical support to the Transfield group including the first plaintiff. The second plaintiff, by reason of its association with the first plaintiff as joint venture partners under the said project, receives a similar backing and support from the Transfield group. The plaintiffs are also involved in several infrastructure contracts on several other projects.

A Counsel contended that whilst they recognize that the performance bond is unconditional in nature, the defendant in the circumstances of this case should not have been allowed to make the demand in the first place and/or to place their hands on the proceeds under the performance bond.

In opposing the application, leading counsel for the defendant B submitted that the defendant never allowed the plaintiffs to recommence work on the site. He pointed out that the suggestion made by the plaintiffs that work was carried on by them after 21 February 1998 is incorrect. It is also their stand that the addendum does not constitute an agreement and that the contract was at an end and new contractors came in to complete the works.

C Counsel then referred to encl 10 which is an ex parte summons in chambers filed by the defendant on 17 March 1998 wherein they applied for:

(1) an injunction to restrain the plaintiffs:

D (a) from occupying the works site;

(b) remaining on or continuing in possession or occupation of the works site;

(c) interfering with the possession and/or occupation of the site by the defendant or any other contractor appointed by the E defendant;

(2) a declaration that the plaintiffs' licence to occupy the site has terminated;

(3) an order that the plaintiffs do forthwith quit and deliver vacant possession of the site to the defendant;

F (4) an order that the defendant or any contractor appointed by the defendant be allowed to enter onto the site and retake possession thereof immediately;

(5) an order that the plaintiffs be restrained from obstructing, preventing or in any other way restraining the defendant or any contractor G appointed by the defendant from entering onto the site and taking possession of the same.

The minutes of the learned judge who heard encl 10, T Selventhiranathan J, show that he ordered that that enclosure be heard inter-partes and that on 21 March 1998 he allowed the application made by the defendant with H costs. In his judgment in relation to that enclosure, T Selventhiranathan J, when referring to the addendum and a letter from the plaintiffs dated 26 February 1998, said:

> It is to be noted that this minute was prepared by the plaintiffs' representative at the meeting and it recognizes that the amended contract [supplementary I agreement] was to be targeted for resolution within one week from the signing of Addendum No 1/98 and the supplementary agreement was yet to be finalized. In light thereof, the plaintiffs are hard put to show agreement was reached for them to continue with the works. That they recognized this is

evident from exhibit 'KEP-12' to encl (9) at p 290 where they wrote to the defendant the same day as follows:

The Superintending Officer's Representative
The B/M/W Joint Venture
Southern Support Zone
Tapak Projek KLIA
43900 Sepang
Selangor Darul Ehsan

Attn: Mr John Spencer

Dear Sir

Re: MAS CATERING FACILITY
Without prejudice to its rights, Transfield Bina Logamaya gives formal notice that in good faith and in an attempt to reach a new agreement it has begun the process of remobilizing the site with its personnel and plant, but that until such time as a new contract is brought into existence no construction work shall be commenced.

Yours Faithfully

for TRANSFIELD PROJECTS (M) SDN BHD/
BINA LOGAMAYA SDN BHD JV

[Sgd]
MC Curtis
PROJECT DIRECTOR.

This letter recognizes that an attempt was afoot 'to reach a new agreement' and 'that until such time as a new contract is brought into existence no construction work shall be commenced'.

There was an immediate response to this by the defendant as per exhibit 'KEP-13' to encl (9) at p 291 which made it clear that as far as the defendant was concerned, its stand was that the plaintiffs 'had unilaterally terminated the contract and stopped work' and the plaintiffs were therefore 'to refrain from giving instructions related to execution of the works and further you [ie the plaintiffs] shall not prevent any persons or parties whatsoever from complying with instructions issued to them by the SOR' [ie superintending officer's representative].

To my mind, this certainly was not the response expected of a party who had reached agreement in the morning for the plaintiffs to continue with the contracted works. The plaintiffs do not appear to have responded to this letter. The plaintiffs also reiterated what appears to have been their stand as at 26 February 1998 that no construction works shall be commenced 'until such time as a new contract is brought into existence'. In other words, the plaintiffs themselves recognized that, as of that date, the contractual relationship between the parties was not obtaining any more.

This recognition by the plaintiffs of the position militates against any argument by Mr Sabapathy for the plaintiffs that they were continuing with new works on site in pursuance of the original contract and/or variation thereof. One must not lose sight of the fact that the plaintiffs themselves were not happy with the rejection of certain works done and/or disputes arising

> from works they claimed to have completed but did not meet with the SO's approval. This was to the tune of some RM16 million. This accords with DW1's (ie John Spencer's) oral testimony that the plaintiffs were attending to what I would call 'old work' which needed completion and/or rectification. DW1 is the defendant's superintending officer's representative. The fact of the matter is that this package relating to the MAS catering building is about 80% completed and therefore clearly behind schedule, as far as completion by the plaintiffs is concerned.

In the later part of his judgment, the learned judge went on to say:

> Their claim to subsequent remobilisation must be looked at from the various notices given by the defendant that their continued presence as contractor on site was untenable and interfering with the completion of works.

From my reading of the addendum and the judgment of T Selventhiranathan J in relation to encl 10, it is my view that the claim by the plaintiffs in this application that they commenced remobilisation on the site as a result of the negotiations after the draft supplemental agreement was drafted and the claim that they had proceeded to fulfill their obligations under the contract as per the compromise reached do not seem to fall in place with that part of the judgment of T Selventhiranathan J. What is also glaring in that judgment is the finding of the learned judge that the works were behind schedule. Further, it is not disputed that the draft supplementary agreement was never formalized and executed. Under the circumstances I cannot see how the claim of the plaintiffs that the call on the performance bond was made contrary to the understanding and compromise reached between the parties on 26 February 1998 can hold water. It is their contention that it was unconscionable for the defendant to call in the performance bond when they were still giving instructions of the site. It is my view that they have failed to show how this ground can stand at all in the light of what has been illustrated above by the learned judge in his decision on encl 10.

What is a performance bond? According to Poh Chu Chai in his book entitled *Law of Banking* (2nd Ed) at p 824, a performance bond is 'essentially a guarantee given by a bank, on behalf of customers to a third party, that the customer would duly carry out his contract with the third party'. In *Teknik Cekap Sdn Bhd v Public Bank Bhd* [1995] 3 MLJ 449, Shaik Daud JCA had this to say (at p 454):

> Having considered the submissions it is relevant to find out what therefore is a performance bond. As I see it there is nothing special or unique in a performance bond. It is in fact a written contract of guarantee by a bank, other financial institutions or in some cases an insurance company, whereby they guarantee the due performance of a contract and in the event of a breach or non-performance of the contract, they guarantee to pay, on a written demand being made, the sum stipulated in the guarantee. Therefore a performance bond is nothing more than a written guarantee, and in order to interpret the obligations of the bank, one need only to look at the written bond itself to determine what are the terms and conditions agreed upon between the parties. A great deal, therefore, depends on the wording of the bond itself.

In *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formenrly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517, Mohammed Dzaiddin FCJ said (at p 535): A

> A bank guarantee is a performance bond. There are two types of performance bond. The first type is a conditional bond whereby the guarantor becomes liable upon proof of a breach of the terms of the principal contract by the principal and the beneficiary sustaining loss as a result of such breach. B The guarantor's liability will therefore arise as a result of the principal's default. The second type is an unconditional or 'on demand' performance bond which is so drafted that the guarantor will become liable merely when demand is made upon him by the beneficiary with no necessity for the beneficiary to prove any default by the principal in performance of the principal contract. C

The performance bond in the instant case is what is usually called an 'on demand bond'. In *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149, Peh Swee Chin FCJ said (at p 157–158):

> On the type of such pure on demand performance bonds, the issuer should D unquestionably pay on demand except in the case of fraud. Any argument of immediate disadvantage to the party who caused such a document to be in use is of no avail to the party who must face the risks of such unquestioned payment except where there is fraud; ...

The main ground on which the plaintiffs based their application upon is that E it would be unconscionable for the defendant to utilize the proceeds of the performance bond. A question arising is, what can the defendant do with the monies upon receipt of it? Another question arising is, can the defendant be obligated to create and establish a trust fund into which proceeds of the performance bond are to be kept? To answer these questions, I would think that the most convenient course is to start with the performance bond itself. F Clause 1 of the performance bond read 'On the Employer's first written demand, the Guarantor shall forthwith pay to the Employer the amount specified in such demand notwithstanding any contestation or protest by the Contractor or Guarantor or any other third party and without proof or conditions.' What does the contract say in relation to the performance bond? Sub-clause (c) of cl 37 of the conditions of contract entitled G 'Performance Bond' read:

> If the Contractor fails to execute the Contract or commits any breach of his obligations under the Contract, the Employer or the SO on its behalf may utilize and make payments out of or deductions from the said Performance Bond or any part thereof in accordance with the terms of this Contract. H

The plaintiffs are asking the court to grant an injunction to restrain the defendant from utilising the monies. From my reading of cl 37(c) I do not think an injunction should be granted to restrain the defendant, who now has the proceeds of the performance bond, to set it aside in an account on trust pending arbitration. There is no existence of any obligation on the part I of the defendant to do so. To grant such an injunction as prayed for would allow a departure from the contract to which the parties have committed

A themselves. There is clearly no subsisting obligation on the defendant who has already received the monies as the result of the call made on the performance bond to set it aside and not to appropriate it. Clause 37(c) provides the defendant or the SO on its behalf may utilize and make payments out of or deductions from the said performance bond, ie they may have recourse thereto for payments. The court is now asked to grant an B injunction when there is clearly no obligation imposed on the defendant anywhere in the contract to set the proceeds as a separate trust fund to be kept until the outcome of the arbitration.

The granting of interlocutory injunctions of this type is a discretionary remedy. To me, there is nothing in the contract to obligate the defendant to C set up a separate trust account to keep the proceeds of the performance bond. What is clear from the facts of this case is the plaintiffs failed to complete the works. That being the situation, I cannot see any basis for me to grant the injunction prayed for.

The plaintiffs insist they require the protection of an injunction to D restrain utilisation of the proceeds of the performance bond. Counsel for the plaintiffs say the plaintiffs have never in the past faced a similar situation wherein a performance bond has been acted or called upon and that if the defendant is not so injuncted, the plaintiffs' business and reputation would suffer by reason of the call on the performance bond and such hardship will be far greater than any benefit that the defendant would obtain. He also E contended that the plaintiffs would face tremendous problems in obtaining references from banks for such performance bonds in future. As to how this would or could be the repercussion, however, not been illustrated by the plaintiffs. Both plaintiffs are locally incorporated companies and how their reputation would or could suffer by reason of the call of the performance bond has not been clearly explained. In *Bocotra Construction Pte Ltd & Ors* F *v Attorney General* (No 2) [1995] 2 SLR 733 Karthigesu JA has this to say (at p 747) on a similar contention raised:

> If 'damage to reputation' is accepted generally as a form of irreparable damage, then this can be easily invoked in every instance where performance bonds or bank guarantees had been issued. Rolfe J himself confessed that G should the plaintiff's ability to perform the contract be called in question, 'it is not difficult to infer that there will be damage to its reputation in the industry in which it operates'. We are not persuaded by the appellants' submissions on this count. We disagree in particular with the appellants' contention that it would be relevant to consider the unthinkable consequences for large and established companies such as the appellants if their reputations H were to be called in question. The appellants went so far as to submit that any suggestion that there had been no due performance while the dispute was still in the midst of arbitration would cast a slur on the appellants' reputation, such as to amount to some form of libel. This submission is, in our view, devoid of any possible justification. We do not see any reason why the courts should strive to uphold a presumption of infallibility on the appellants' part.

I I am in agreement with the views of the learned judge in the above case. To uphold such a contention would open the floodgates for parties who have submitted performance bonds under building contracts to invoke the same in every instance. The plaintiffs in the instant case have failed to show that if the defendant is not so injuncted, irreparable harm or damage would be caused to them and such harm or damage would place them in an irretrievable position incapable of remedy by way of damages.

The prerequisites which must be present before a court can determine whether an interlocutory injunction should lie has been adequately dealt with by our courts in several decided cases. In *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241, Mohd Jemuri Serjan CJ (Borneo) said:

> Firstly, the plaintiffs' case must raise serious issues to be tried. If the plaintiffs fail at that point there is clearly no case for an injunction. Secondly, the trial of the main suit is likely to take place in the sense that the plaintiffs' case shows that they are genuinely concerned to pursue the claim to trial and they are seeking the injunction as a means of holding operation pending the trial. Once it can be established that there are serious questions to be tried then the other guidelines must be invoked. The court has to consider: Q2(a) Whether damages are adequate remedy; Q2(b) Where does the 'balance of convenience' lie;
>
> (c) Are there any 'special factors'.

What is clear is the only ground that has been forwarded by the plaintiffs in seeking the injunction is that it is unconscionable, or in other words it is inequitable, of the defendant to call on the performance bond. In *Sri Palmar Development & Construction Sdn Bhd v Transmetric Sdn Bhd* [1994] 1 CLJ 224, Shankar J (as he then was) refused to consider equitable considerations as between employer and contractor and refused the contractor's application for an injunction to restrain the calling of the performance bond because the terms of the bond required payment 'notwithstanding any contestation and protests'. He said (at p 227):

> But much as I sympathized with the plight of TM I regret that there was nothing this court could do but to dismiss the application because the terms of the bond, in my view left the court with no choice. This court is not unaware that an unscrupulous employer can easily cheat an unsuspecting contractor by calling in the bond on some flimsy pretext and thereby get an immediate windfall of ready cash, leaving the contractor with the frustration and pain of a protracted law suit which could take years to resolve. Alternatively an incompetent contractor may choose to abandon the works because it has become unprofitable for him to continue, and so put the employer in the lurch unless there is a performance bond which gives him ready money to get somebody else to carry on and complete the works invariably at a higher cost. But these are not considerations of immediate relevance because the court must find take the bond as it finds it.

In *Keet Gerald Francis Noel John v Mohd Noor @ Harun bin Abdullah & Ors* [1995] 1 MLJ 193, the Court of Appeal stated if a judge hearing an application for an interlocutory injunction finds 'upon a consideration of all the relevant materials before him, including submissions of counsel, that no serious question is disclosed, that is the end of the matter and the relief is refused'. In the instant case, I find there is no serious question to be tried and hence I dismissed the application with costs.

Application dismissed.

Reported by Andrew Christopher Simon
